Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77-1738 ~~77-1878~~

Freddie Jerome Williams ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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NO. 77-_____

Freddie Jerome Williams .....*Petitioner*

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United States of America .....*Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Freddie Jerome Williams, requests that the United States Supreme Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which was rendered on April 13, 1978. Petitioner's Motion for Rehearing was denied on May 9, 1978.

OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix to this Petition. At the time of writing of this petition, the opinion is unreported. There is no reported opinion to the United States District Court for the Eastern District of Arkansas, Western Division.

JURISDICTION

Petitioner was convicted on two counts of distributing a controlled substance in violation of 21 U.S.C. §841 (a) in a jury trial before the Honorable Oren Harris, United States Senior District Judge for the Eastern District of Arkansas. Judgment of conviction was entered on December 15, 1977. Petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit. His conviction was affirmed in a per curiam opinion filed April 13, 1978. Petitioner moved for a rehearing and the Motion for Rehearing was denied on May 9, 1978. Petitioner asks the United States Supreme Court to review the opinion of the Eighth Circuit Court of Appeals pursuant to its statutory authority designated in 28 U.S.C. §1254 and United States Supreme Court Rules, Rule 19.

QUESTIONS PRESENTED

Were Petitioner's rights to due process of law under the Fifth Amendment of the United States Constitution and to trial by an impartial jury under the

Sixth Amendment to the United States Constitution violated by remarks of the United States Attorney during opening statement?

Was Petitioner's right to due process of law under the Fifth Amendment of the United States Constitution violated by the trial court's ruling allowing Willie Jackson, a material witness and active participant in the alleged offense, to testify over Petitioner's objection after the government failed to provide the name of Willie Jackson as a potential witness in its response to Petitioner's discovery motion?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five of the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, in the militia, when in actual service in time of war or public dangers; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment Six of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rules of Criminal Procedure, Rule 16 is attached hereto in the appendix.

21 U.S.C. §841 (a) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowlingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intert to manufacture, distribute, or dispense, a controlled substance, or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

STATEMENT OF THE CASE

Petitioner was convicted on two counts of distributing a controlled substance in violation of 21 U.S.C. §841 (a) in a jury trial before the Honorable Oren Harris, United States Senior District Judge for the Eastern District of Arkansas. During opening statement by the government the Assistant United States Attorney made remarks referring to an informant stating, "You've got to at some time give one or two a break in order to get ten and, in this instance that is what happened." Further, in referring to a Drug Enforcement Administration agent, the Assistant United States Attorney stated, "This happened to be the first case that Agent Harry was involved in—in the series of cases in Little Rock..." Petitioner's attorney objected and moved for a mistrial. The Court issued an admonition.

It is Petitioner's position that the admonition was inadequate and the remarks of the Assistant United States Attorney so prejudiced petitioner's right to a fair trial before an impartial jury, that his constitutional rights to due process of law under the Fifth Amendment and his right to trial by an impartial jury under the Sixth Amendment of the United States Constitution were violated.

Petitioner's second argument rests upon the government's failure to supply petitioner's trial counsel with the name of Willie Jackson, a material witness to the alleged criminal violation and the trial court's

subsequent overruling of Petitioner's counsel's motion to prohibit the government from using Jackson as a witness at the trial of the case. Prior to trial defense counsel requested from the government, "The name of every person, other than the defendant, who directly or indirectly participated in or witnessed the defendant's alleged distribution." The government answered Petitioner's motion without any indication that other witnesses might be utilized whose identity would be withheld from the defense. Jackson testified that he was in the club at the time the alleged sale took place. A Drug Enforcement Administration agent testified that Jackson was present and announced that the deal was ready.

REASONS FOR GRANTING THE WRIT

1. Were Petitioner's rights to due process of law under the Fifth Amendment of the United States Constitution and to trial by an impartial jury under the Sixth Amendment to the United States Constitution violated by remarks of the United States Attorney during opening statement?

During opening statement by the government the Assistant United States Attorney made remarks referring to an informant stating, "You've got to at some time give one or two a break in order to get ten and in this instance that is what happened." (T. 16) Further, in referring to a Drug Enforcement Administration agent, the Assistant United States Attorney stated, "This happened to be the first case that Agent Harry was

involved in—in the series of cases in Little Rock..." (T. 17) Petitioner's counsel objected and moved for mistrial.

"I want to move at this time for a mistrial. His remarks are calculated and prejudice this jury by indicating — or by inference — that there is a ring of dope peddlers or something involved here. I'd like to ask the Court to rule on that.

The Court: Well, the Court does not think the request for a mistrial is appropriate at this time, or merited, and therefore, the motion will be denied. But, I again suggest to you, Mr. Curdie, to proceed, indicate to the jury what you expect the testimony in these two cases will show." (T. 17)

The remarks of the United States Attorney insinuated that Appellant was part of a large conspiracy to market heroin in the Little Rock area and part of a network which justified the use of a specially trained agent of the Drug Enforcement Administration. These remarks, which were not substantiated by the evidence, greatly overdramatized the importance of the trial and misrepresented the activities of the defendant. It is Petitioner's position that the prejudicial impact of those statements was not erased by the trial court's limited admonition and his rights to due process of law under the Fifth Amendment of the United States Constitution and his right to trial by an impartial jury guaranteed by the Sixth Amendment of the United States Constitution were therefore violated.

The Assistant United States Attorney's duty is not only to legitimately convict but also to refrain from improper methods. *Minker v. United States*, 85 F. 2nd 425 (3rd Cir. 1936). In *Minker v. United States*, supra, the prosecution went to great lengths to describe the government's efforts in apprehending alleged conspirators violating laws relating to non tax paid distilled spirits. Among the prosecutor's improper remarks referred to by the Court at 426 was the following -

> "The evidence will show that the government could have included 100 or more in this indictment but we chose to eliminate the minor ones and put in about 62 that we felt were necessary and could be convicted."

The Assistant United States Attorney's opening remarks in the instant case were very similar to those cited above and the prejudicial impact of those statements precisely the same.

In a criminal prosecution it is a matter of fundamental fairness that the defendant be jealously protected against inflammable statements and prejudicial statements not based upon the evidence or fair and reasonable deduction therefrom. See, *United States v. Barbone*, 283 F. 2nd 628 (3rd Cir. 1960). The danger of prejudicial remarks by the government's attorney in opening is magnified by his position not only as an advocate but as a quasi-judicial officer. In *Berger*

v. United States, 295 U.S. 78 (1935) the Court noted, "It is fair to say that the average jury in a greater or less degree, has confidence that these obligations (to refrain from using improper methods), which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly have none." See also, *Dunn v. United States*, 307 F. 2nd 883 (5th Cir. 1962 and *Taliaferro v. United States*, 47 F. 2nd 699 (9th Cir. 1931).

In determining the prejudicial capacity of the opening statement, the primary focus is on the impact of the statement in the context of the entire trial and not in isolation. *United States v. De Rosa*, 548 F. 2nd 464 (3rd Cir. 1977). *United States v. Lewis*, 547 F. 2nd 1030 (8th Cir. 1976) and *Mores v. United States*, 409 F. 2nd 1083 (10th Cir. 1968). The jury could hardly avoid the message the Assistant United States Attorney attempted to convey by his opening remarks. The remarks created the appearance of a large local conspiracy justifying entry of a specially trained agent. That conspiracy was not substantiated by the evidence. The prejudicial impact of those statements could not be erased by the Court's admonition. As one appellate judge stated in reference to unwarranted inferences or insinuations calculated to prejudice Defendant, "If you throw a skunk into the jury box, you can't instruct the jury not to smell it". *Dunn v. United States*, supra at 886.

The Petitioner submits that his rights under the Fifth Amendment of the United States Constitution to due process of law and to a fair trial before an impartial jury under the Sixth Amendment of the United States Constitution were violated by the prejudicial opening remarks of the Assistant United States Attorney and, therefore, a special and important reason exists for granting Certiorari.

2. Was Petitioner's right to due process of law under the Fifth Amendment of the United States Constitution violated by the trial court's ruling allowing Willie Jackson, a material witness and active participant in the alleged offense, to testify over petitioner's objection in that the government failed to provide the name of Willie Jackson as a potential witness in its response to Petitioner's discovery motion.

Defense counsel requested from the government prior to trial "The name of every person, other than the defendant, who directly or indirectly participated in or witnessed the defendant's alleged distribution." The government answered the request listing witnesses without any indication that other witnesses might be utilized whose identity would be withheld from the defense. During presentation of the government's case Willie Jackson was called to the stand to testify. The defendant objected in that Jackson's name had not been supplied to the defense in response to the discovery motion. (T. 95, 96). The defense motion was overruled. (T. 97) Jackson went on to testify, inter alia, that he was in Petitioner's club at

the time the alleged initial sale took place. Drug Enforcement Administration Agent Bernard Harry had earlier testified that Jackson was present and announced that the deal was ready. (T. 39)

Petitioner concedes that the discovery of all prospective witnesses is not required under F. R. Crim. Pro. Rule 16 (a). However, since the Assistant United States Attorney acquiesced in Defendant's request for witnesses prior to trial, the government should be held to have waived any right to withhold the names of prospective witnesses under F. R. Crim. Pro. Rule 16 (a). Had the government indicated an intention to withhold witnesses from the defense, the defense could have asked for a hearing in the matter and the government could have there raised its reasons for nondisclosure and the court could have ruled. Under F. R. Crim. Pro. Rule 16 (2) the Court is given the latitude to regulate discovery. The Court could have there utilized a balancing test — Is the need for the requested information outweighed by the government's need for confidentiality and security of witnesses? See, *United States v. Holmes*, 343 F. 2nd 272 (D. C. App. 1975), *United States v. Villa*, 370 F. Supp. 515 (D. C. Conn. 1974) and *United States v. Moceri*, 359 F. Supp. 431 (N. D. Ohio 1973). The modern trend is overwhelmingly towards broad disclosure to make the trial a search for truth and correct the imbalance between investigative resources available to the government and to the defendant. See, *United States v. Bryant*, 439 F. 2nd 642 (D. C. Cir. 1971), *United States v. Addonizio*, 313 F. Supp. 486, aff'd 451 F. 2nd 49 (1970), and see generally,

ABA Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial (approved draft, 1970). The rationale favoring broad disclosure "... is not simply to correct an imbalance in advantage, where the prosecution may surprise the defense at trial with new evidence; rather, it is also to make the trial a search for truth informed by all relevant material, much of which, because of imbalances in investigative resources, will be exclusively in the hands of the government." *United States v. Bryant*, supra at 648.

Further, when the witness is an active participant or a witness to the offense charged, disclosure of the name and whereabouts of the witness will almost always be material to the accused's defense. *United States v. Barnes*, 486 F. 2nd 776 (8th Cir. 1973). One of the most relevant factors to be weighed in determining whether the government is under a duty of disclosure is whether or not the evidence is material to the defense for a fair determination of the case. *United States v. Barnes*, supra. See also *Roviaro v. United States*, 353 U.S. 53 (1957). Testimony by Agent Harry indicated that Jackson was in the club at the time the alleged sale took place and announced that the deal was ready. As a material witness his name should have been supplied to the defense regardless of the nondisclosure nature of Rule 16 (a).

The United States Court of Appeals for the Eighth Circuit in the opinion below indicated that a

Motion for Continuance would have properly remedied the situation. However, to take such a position jeopardizes defendant's right to a speedy trial through no fault of his own. The trial should have continued with the exclusion of Jackson's testimony.

Therefore, Petitioner contends that his right to due process of law under the Fifth Amendment of the United States Constitution was violated through the government's failure to supply the name of Willie Jackson as a potential witness and the trial court's overruling of trial counsel's motion to prohibit Jackson from testifying. Special and important reasons exist for granting the Petition for Certiorari to define the discovery requirements placed upon the government under Rule 16 (a).

CONCLUSION

A Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit. The judgment should be reversed and the cause remanded to the United States District Court for the Eastern District of Arkansas, Western Division for a new trial.

Respectfully submitted,

McARTHUR & LASSITER
800 Tower Building
Little Rock, Arkansas 72201

Attorneys for Petitioner

PROOF OF SERVICE

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Don Curdie, Assistant United States Attorney, Justice Building, Little Rock, Arkansas 72201, this 30th day of May, 1978, by depositing a copy of said Petition in the United States Mail with first class postage prepaid, and that all parties required to be served a copy of this Petition have been served.

Jack T. Lassiter

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 77-1993

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern District
Freddie Jerome Williams,	*	of Arkansas.
	*	
Appellant.	*	

Submitted: April 6, 1978
Filed: April 13, 1978

Before HEANEY, STEPHENSON and HENLEY, Circuit Judges.

PER CURIAM.

Freddie Jerome Williams was convicted after a jury trial on two charges of distributing a controlled

substance (heroin) in violation of 21 U.S.C. §841 (a). The district court [1] sentenced him to two years imprisonment and a three year special parole term on each charge, with the sentences to run concurrently.

The facts leading up to appellant's conviction may be summarized as follows. In January, 1977 one George Marshall was arrested by Little Rock police officers and charged with possession of heroin. Marshall was contacted by state and federal narcotics agents. They proposed that if Marshall would work with them in an attempt to expose heroin dealing in an area near Little Rock known as College Station they would bring his cooperation to the attention of the state prosecutor in an attempt to obtain lenient treatment. Marshall agreed.

Marshall was informed that his first assignment would be to introduce D.E.A. Agent Bernard Harry to individuals in the College Station area whom Marshall believed to be involved in selling heroin. Agent Harry would then attempt to purchase heroin from these individuals.

Marshall had known appellant for several years. On March 15, 1977 Marshall and Agent Harry drove to the C and S Club, which is operated by appellant. Marshall got out of the car and spoke with appellant. Agent Harry remained in the car. Marshall returned to

1. The Honorable Oren Harris, United States Senior District Judge for the Eastern District of Arkansas.

the car and indicated that appellant would be prepared to sell heroin later that day.

Marshall and Agent Harry returned to the C and S Club later that afternoon. Marshall talked to appellant in a back room of the club, returned to Agent Harry, and said that appellant had $300.00 and $400.00 bags of heroin for sale. Appellant returned from the back room shortly thereafter and Marshall introduced him to Agent Harry. Agent Harry told appellant that he wanted to buy a $400.00 bag. Appellant agreed, walked in the direction of the back room, and signaled Marshall to follow him. After a few minutes Marshall told Agent Harry to come to the back room. Agent Harry did so, and when he entered Marshall handed a heat-sealed plastic bag to Appellant Harry. The bag was warm and Agent Harry saw appellant holding an iron in his hand. Agent Harry then asked appellant what the price was, appellant told him, and Agent Harry tried to hand the $400.00 to appellant, but appellant said "Give it to George [Marshall]." Agent Harry did so and Marshall in turn handed the money to appellant, who placed it in his pocket. Agent Harry then asked about buying a larger amount of heroin in the future and appellant indicated that would be possible.

On March 16, 1977 Marshall and appellant agreed to a sale of a $500.00 bag of heroin later in the day. Marshall and Agent Harry returned to the C and S Club that evening. Present at the club was Willie Jackson who told Agent Harry that the deal was ready. Appellant approached Agent Harry and told him that he

would have to wait for about five minutes. Then Marshall and Agent Harry entered the back room with appellant and the sale was consummated in the same way as the first, except that Agent Harry handed the purchase money directly to appellant. Appellant then handed Agent Harry a slip of paper with his (appellant's) phone number on it and told Agent Harry to call if he wanted more heroin. Chemical analysis subsequently revealed that both bags purchased from appellant contained heroin.

Appellant took the stand in his own defense and denied that any of the above related events occurred.

The jury returned a verdict of guilty on both charges and this timely appeal ensued. Appellant now contends that the district court erred by refusing to grant his motion for mistrial due to allegedly prejudicial remarks during the government's opening statement and by allowing Willie Jackson to testify although Jackson's name had not been disclosed as a witness in the government's response to appellant's bill of particulars.

Appellant's motion for a mistrial was made after the Assistant United States Attorney made the following statement:

> And, Agent Harry was contacted by the Little Rock Office — Agent Bernard Harry — you will see him and hear his testimony. He works for the Federal Drug Enforcement Administration in

> New Orleans. He was contacted up here. And, George Marshall was introduced to him. And, ladies and gentlemen, those are really the bare facts. *You've got to at some time give one or two a break in order to get ten.* And, in this instance that is what happened. The case against George Marshall that they had in state court was dismissed about a month ago after his assistance that he gave to the Federal Drug Enforcement Administration in introducing this Agent [Harry] to individuals in College Station, Arkansas. This happened to [be] the first case that Agent Harry was involved in — in the *series of cases in Little Rock* — that he — (Emphasis added).

Appellant moved for a mistrial based on the premise that the prosecutor's remarks were intended to prejudice the jury by implying that appellant was part of a "ring of dope peddlars [sic]." The court denied the motion for mistrial, but did caution the prosecutor to confine himself to relating what he expected the testimony at trial would show.

Although the prosecutor's statements would possibly be interpreted as appellant's counsel suggested, we are of the view that the statements would not be so interpreted by a reasonable jury. The implication was certainly oblique and we note that no further comment which might have reinforced this implication was made. The court also admonished the prosecutor to confine himself to describing what he believed the evidence at trial would show. We hold that this passing, indirect comment was not of such nature that the jury would be

prejudicially affected by it. *See United States v. Williams*, 502 F. 2d 581, 584 (8th Cir. 1974). [2]

Appellant's second contention is that the district court erred by allowing Willie Jackson to testify, over appellant's objection, because Jackson was not listed as a witness in the government's response to appellant's bill of particulars.

We begin by noting that discovery of prospective witnesses is not required under Fed. R. Crim. P. 16 (a). *United States v. Krohn*, 558 F. 2d 390, 394 (8th Cir.), *cert. denied*, 98 S.Ct. 207 (1977); *United States v. Rogers*, 549 F. 2d 490, 494 (8th Cir.), *cert. denied*, 431 U.S. 918 (1977). In addition, relief under the discovery rules is a matter committed to the discretion of the district court and is reviewable only for an abuse of that discretion. *United States v. Krohn*, supra; *United States v. Crow Dog*, 532 F. 2d 1182, 1189 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977).

Appellant contends that Jackson's appearance as a witness left him unprepared and surprised and thus

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2.

Appellant objected to two other prosecutorial comments during the opening statement, but did not move for a mistrial. After both statements, the court admonished the prosecutor to confine himself to informing the jury what he believed the evidence at trial would show. The court also instructed the jury, during the opening statement, that arguments of counsel are not evidence and that the court would instruct the jury as to the law. We have carefully examined the record and find that the prejudicial effect of these statements, if any, was negated by the court's prompt warnings to the prosecutor and instruction to the jury.

deprived him of a fair trial. However, when time is needed properly to utilize new information produced during trial, the defendant should seek a continuance. *United States v. Krohn*, supra; *United States v. Bailey*, 550 F. 2d 1099, 1101 (8th Cir. 1977). We also note that there is some doubt whether appellant's request for witnesses was broad enough to include Jackson. In the circumstances, we are convinced that appellant has failed to show prejudice to his substantial rights, and that the district court did not abuse its discretion in allowing Jackson to testify.

The Judgment of conviction is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

DISCOVERY AND INSPECTION

RULE 16. Discovery and Inspection
[a] Disclosure of Evidence by the Government.

[1] Information Subject to Disclosure.

[A] Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written

or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

[B] Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

[C] **Documents and Tangible Objects.** Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

[D] **Reports of Examinations and Tests.** Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

[2] **Information Not Subject to Disclosure.** Except as provided in paragraphs (A), (B), and (D) of subdivision (a) (1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500.

[3] **Grand Jury Transcripts.** Except as provided in Rule 6 and subdivision (a) (1) (A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[b] Disclosure of Evidence by the Defendant.

[1] Information Subject to Disclosure.

[A] **Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a) (1) (C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

[B] **Reports of Examinations and Tests.** If the defendant requests disclosure under subdivision (a) (1) (C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to

call at the trial when the results or reports relate to his testimony.

[2] **Information Not Subject to Disclosure.** Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

[c] **Continuing Duty to Disclose.** If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

[d] **Regulation of Discovery.**

[1] **Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone.

If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

[2] **Failure to Comply With a Request.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and prescribe such terms and conditions as are just.

[e] **Alibi Witnesses.** Discovery of alibi witnesses is governed by Rule 12.1.

As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, §3(20)-(28), 89 Stat. 374, 375.